



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2015 TMOB 107**  
**Date of Decision: 2015-06-12**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Davis LLP against registration  
No. TMA695,397 for the trade-mark ALL-STAR GAME  
in the name of Office of the Commissioner of Baseball**

[1] At the request of Davis LLP (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on April 3, 2013 to Office of the Commissioner of Baseball (the Owner), the registered owner of registration No. TMA695,397 for the trade-mark ALL-STAR GAME (the Mark).

[2] The Mark is registered in association with the following goods and services:

Goods: Metal novelty items, namely, key chains and money clips, all relating to or promoting the sport of baseball; watches, clocks, souvenir coins, and jewelry, namely, wall clocks and wristwatches, non-monetary coins and medallions, lapel pins, pins, pendants and charms, all relating to or promoting the sport of baseball; paper goods and printed matter, namely laminated paper signs, decals, paper weights, posters, baseball cards, programs, magazines, books, all relating to or promoting the sport of baseball; luggage, namely, all purpose athletic bags, tote bags, all relating to or promoting the sport of baseball; beverage containers, namely mugs, water bottles, aluminum tankards, foam can holders, ceramic mugs, ceramic tankards, glass tankards, glasses, vacuum bottles, all relating to or promoting the sport of baseball; fabrics, namely, towels, pennants, all relating to or promoting the sport of baseball; clothing, namely, shirts, shorts, jackets, sweaters, hats, caps, sweatshirts, all relating to or promoting the sport of baseball; toys and sporting goods, namely stuffed animals, baseballs, gloves and mitts, Christmas tree ornaments, computer and electronic games, golf equipment, including golf balls, autographed baseballs and inflatable bats, all relating to or promoting the sport of baseball.

Services: Entertainment services in the nature of the presentation and promotion of baseball games and exhibitions rendered live and through the media of radio and television broadcasts, which are played by selected players of the Major League Baseball organizations, namely, the American and National Leagues of professional baseball clubs.

[3] The section 45 notice required the Owner to furnish evidence showing that it had used the Mark in Canada in association with each of the goods and services specified in the registration within the time period between April 3, 2010 and April 3, 2013.

[4] The definitions of “use” with respect to goods and services are set out in section 4 of the Act as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

4(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

4(3) A trade-mark that is marked in Canada on goods or on the packages in which they are contained is, when the goods are exported from Canada, deemed to be used in Canada in association with those goods.

#### Owner’s Evidence

[5] In response to the Registrar’s notice, the Owner furnished the affidavit of Ethan G. Orlinsky, sworn January 31, 2014 in New York, New York. Only the Requesting Party filed written representations; an oral hearing was not held.

[6] In his affidavit, Mr. Orlinsky’s identifies himself as the Corporate Secretary of Major League Baseball Properties, Inc. (MLBP). He explains that MLBP is the licensing agent of the Owner. With respect to use of the Mark, his affidavit is brief, consisting of only the following substantive paragraphs and no exhibits:

6. Upon information and belief, during the Material Period the ALL-STAR GAME mark was displayed on wares set out in [the registration] which were made available for sale to the Canadian public via the website *www.mlb.com*. Upon information and belief, during

the Material Period the ALL-STAR GAME mark was displayed during the performance and/or advertising of services set out in [the registration].

7. As demonstrated above, [the Owner] used its ALL-STAR BASEBALL [sic] mark during the Material Period in Canada in association with wares and services set out in [the registration] and I hereby confirm that it intends to continue such use in Canada. Accordingly, maintenance of [the registration] is clearly warranted.

### Insufficiency of Evidence

[7] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in a section 45 proceeding is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the goods and services specified in the registration during the relevant period.

[8] In this case, as noted by the Requesting Party, Mr. Orlinsky merely asserts that the goods displaying the Mark were made available for sale during the relevant period. The Owner provides no evidence of any actual sales or transfers in the normal course of trade during the relevant period, in Canada or otherwise.

[9] Although invoices are not mandatory in order to satisfactorily reply to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD); *Gowling Lafleur Henderson LLP v Neutrogena Corporation* (2009) 74 CPR (4th) 153 (TMOB)], use must be shown in association with all of the goods as registered [*John Labatt Ltd v Rainier Brewing Co et al* (1984) 80 CPR (2d) 228 (FCA)]. As such, some evidence of transfers in the normal course of trade in Canada is necessary. Such evidence can be in the form of documentation like invoices or sales reports, but can also be through clear sworn statements. However, as in this case, it is insufficient to merely assert that goods were made available for purchase to Canadians [see *Michaels & Associates v WL Smith & Associates Ltd* (2006), 51 CPR (4th) 303 (TMOB); *Riches, McKenzie & Herbert LLP v Cleaner's Supply Inc*, (2012) TMOB 211].

[10] In any event, in the absence of supporting exhibits such as representative photographs of the goods and/or their packaging, I am unable to conclude that the Mark was even displayed as registered at the time of any sale or transfer. In this respect, I would further note that in paragraph 7 of his affidavit, Mr. Orlinsky refers to the Owner's "ALL-STAR BASEBALL" trade-mark, rather than to the Mark as registered. In the absence of any supporting exhibits to *show* how the Mark was used during the relevant period, I am unable to determine whether this is merely a typographical error in the affidavit.

[11] Similarly, Mr. Orlinsky provides no particulars regarding how, when or where the Mark was displayed in the performance or advertising of the registered services during the relevant period.

[12] In the absence of such supporting exhibits and further particulars, Mr. Orlinsky's statements amount to a mere assertion of use only, rather than statements of fact showing use of the Mark.

[13] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered goods and services within the meaning of sections 4 and 45 of the Act. Furthermore, there is no evidence of special circumstances excusing non-use of the Mark before me.

#### Disposition

[14] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be expunged in compliance with the provisions of section 45 of the Act.

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Andrew Bene  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office